STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Stephens, P.J., and Hoekstra and Meter, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No. 150994

v

LORINDA IRENE SWAIN,
Defendant-Appellant.

Trial Court No. 2001-004547-FC
Court of Appeals No. 314564

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

MCR 6.502(G)(2) allows only claims of retroactivity of new rules and of new evidence. Does the *Cress* standard applies to claims of newly discovered evidence from a neutral source, and the *Brady* standard to claims of new evidence resulting from prosecution suppression of material evidence, whether the claims are brought on a first or successive motion for relief from judgment?

Amicus answers: YES

Statement of Facts

Amicus joins the Statements of Facts of the People fo the State of Michigan.

Argument

I

MCR 6.502(G)(2) allows only claims of retroactivity of new rules and of new evidence. The *Cress* standard applies to claims of newly discovered evidence from a neutral source, and the *Brady* standard applies to claims of new evidence resulting from prosecution suppression of material evidence, whether the claims are brought on a first or successive motion for relief from judgment.

A. Introduction

The Court in its order granting leave to appeal directed that these issues be addressed:

- (1) whether the test set forth in *People v Cress*, 468 Mich 678, 692 (2003), for determining whether a defendant is entitled to a new trial based on newly discovered evidence applies in determining whether a second or subsequent motion for relief from judgment is based on "a claim of new evidence that was not discovered before the first such motion" under MCR 6.502(G)(2);

- (2) whether the defendant is entitled to a new trial premised on the prosecution's violation of the rule set forth in *Brady v Maryland*, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963);

- (3) by what standard(s) Michigan courts consider a defendant's assertion that the evidence demonstrates a significant possibility of actual innocence in the context of a motion brought pursuant to MCR 6.502(G), and whether the defendant in this case qualifies under that standard;

- (4) whether the Michigan Court Rules, MCR 6.500, et seq. or another provision, provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence;

- (5) whether, if MCR 6.502(G) does bar relief, there is an independent basis on which a defendant who demonstrates a significant possibility of actual innocence may nonetheless seek relief under the United States or Michigan Constitutions; and

- (6) whether the defendant is entitled to a new trial pursuant to MCL 770.1.

Amicus begins with question (6).

B. Defendant is not entitled to a new trial under MCL § 770.1

1. Introduction

In the sixth and final question this Court directed be addressed, the Court asks "whether the defendant is entitled to a new trial pursuant to MCL 770.1?" Amicus begins here, for MCR 6.501 commands that "Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed *only in accordance with the provisions of this subchapter*" (emphasis supplied). If the Rule promulgated by this Court does not in fact mean what it says, and a trial judge may grant a motion for new trial under MCL § 770.1 even after the direct appeal is over, then the entire edifice of the motion for relief from judgment rules, and the principles of finality that ediface embodies, crumbles. Why, then, should anyone file a motion for relief from judgment after the direct appeal, with its strictures as to cause and prejudice, when a motion for new trial can be brought under MCL § 770.1, with a favorable decision of the trial court be to reviewed for abuse of discretion? But in truth, the statute does *not* apply after the direct appeal, and the edifice this Court built in MCR 6.501 et. seq. stands.

2. The motion for new trial in history

The Court of Appeals said that MCL § 770.1 is inapplicable here, to a motion brought after the direct appeal and several motions for relief from judgment, not only because MCR 6.501 so says, but because any motion for new trial is necessarily time barred after the direct appeal under MCL

§ 770.2, which provides in part that "in cases appealable as of right to the court of appeals, a motion for a new trial shall be made within 60 days after entry of the judgment."[1] Defendant correctly notes that certainly his case is not appealable by right, and argues that, this being the case, any motion under MCL § 770.1 where the conviction is no longer appealable of right cannot thus *ever* be time barred. Defendant draws the wrong inference. Because a motion for new trial brought under MCL § 770.1 after the appeal of right is not brought in a case "appealable as of right," it is simply *not authorized* by the statute, and review, if there is to be review of the conviction, must be by way of the process and procedure created by this Court in the motion for relief from judgment rules.

An early forerunner to MCL § 770.1 is CL 1857, § 6082: "The court in which the trial of any indictment shall be had, may, *at the same term, or at the next term thereafter*, on the motion in writing by the defendant, grant a new trial, for any cause, for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms or conditions as the court shall direct" (emphasis supplied). The statute remained unchanged in CL 1871, § 7963, CL 1897, § 11963, and CL 1915, § 15836. In CL 1929, § 17355 the timing restriction for the motion—"at the same term, or at the next term thereafter"— was removed, and a timing provision created separately in § 17356: "Motions for new trial shall be made within thirty days after verdict, *and not afterwards*" (emphasis supplied). These provisions continued unchanged in the Compiled Laws of 1948, in § 770.1 and § 770.2.

The law was clear that these timing requirements had to be met, and that, outside of the statutes, there is no right to a motion for new trial. In 1878 this Court considered a case where there

[1] *People v. Swain*, No. 314564, 2015 WL 521623, 6 (2015).

had already been a motion for new trial, and a hearing on exceptions in this Court,[2] and the defendant desired "leave to apply for a new trial, *on the ground of newly discovered evidence*, and for other reasons." This Court said:

> More than one term has expired since her trial. *At common law a new trial was not granted in cases of felony*, and the provisions in our State allowing it *are purely statutory*. Our statutes allow it to be had only in two ways: (1) on exceptions properly taken and sustained by the Supreme Court, and (2) by the court wherein the respondent was tried, "at the same term, or at the next term thereafter." Comp. L., ch. 262.
>
> In this instance a new trial has been refused by this court on exceptions, and by the circuit court on a motion heretofore made in season. We think the statute fixing the time for such a motion cannot be enlarged in its operation, and as there is no such remedy at the common law, *the party is confined to the statutory remedy, which is now barred by lapse of time*.[3]

There thus is no right to a motion for new trial outside of statute, and historically, motions for new trial have been closely cabined by time requirements.

1980 PA 506 amended MCL § 770.2 from "Motions for new trial shall be made within thirty days after verdict, and not afterwards" to read as it does now. Again, defendant argues from the statutory reference to a "case appealable by right" that there are no limitations in time or number to motions for new trial when the case is no longer appealable of right. But the amendment in 1980 was to reflect the existence of intermediate appellate courts, and to thus distinguish between *them* regarding motions for new trial, not to free the motion for new trial from its historical moorings. The language was amended to read

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[2] See *People v. Marble*, 38 Mich. 117 (1878).

[3] *People v. Marble*, 38 Mich. 309 (1878) (emphasis added).

> (1) Except as provided in section 16, in a case appealable as of right *to the court of appeals*, a motion for a new trial shall be made within 60 days after entry of the judgment or within any further time allowed by the trial court during the 60-day period.
>
> (2) In a misdemeanor or ordinance violation case appealable as of right from a municipal court in a city that adopts a resolution of approval under section 23a of the Michigan uniform municipal court act, 1956 PA 5, MCL 730.523a, or from a court of record *to the circuit court*, a motion for a new trial shall be made within 20 days after entry of the judgment.
>
> (3) In a misdemeanor or ordinance violation case appealable de novo *to the circuit court*, a motion for a new trial shall be made within 20 days after entry of the judgment.
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> (4) If the applicable period of time prescribed in subsection (1) or (2). has expired, a court of record may grant a motion for a new trial for good cause shown. If the applicable time period prescribed in subsection (3) has expired and the defendant has not appealed, a municipal court may grant a motion for new trial for good cause shown.

The statute does not create different procedures for motions for new trial where the case is appealable of right and where it is not, it distinguishes appeals of right taken from different courts to different appellate courts in terms of the time for filing (and in one special situation concerns appeals de novo from minor offenses).

Further, the DNA statute, MCL § 770.16, signals the legislative intention that MCL § 770.1 is not applicable *ad infinitum*, but rather expires with the appeal of right. The statute allows, under appropriate circumstances, the testing of biological material for DNA results that might be exculpatory at any time,[4] upon the proper showing. The statute begins, *"Notwithstanding the limitations of section 2 of this chapter . . . ."* (emphasis supplied). The statute, then, is an exception

[4] A time limit was placed in the statute, and moved forward each year, and was eliminated in Senate Enrolled Bill 151 of 2015.

to the time limitation of MCL § 770.2, limiting motions for new trial in to cases "appealable of right" to the Court of Appeals, so as to allow the class of motion for new trial delineated in MCL § 770.16.

The claim, then, that a "delayed motion for new trial" may, under the statute, be filed at any time, and repeatedly, *after* the appeal of right, ignores the provision that the motion for new trial exists for felony cases *only* in a "case appealable as of right to the court of appeals"; there is no other authorization outside of the specific authorization in MCL § 770.16 for DNA testing. The authority to grant an untimely motion for new trial "on good cause shown" applies only in cases *still* "appealable of right to the court of appeals," but made outside the statutory time limit, without an extension gained within that time. But after the constitutional appeal of right is had or forfeited, any later motion for relief in the trial court—whatever it may be called—is no longer in a "case appealable of right to the court of appeals," there being only one appeal of right. Rather than there being a question regarding the authority of this Court to *limit* post-appeal motions for new trial, the question is one regarding the authority of this Court to *authorize* post-appeal review of convictions. The Court *does*, however, have the authority to create a system of post-appeal review of convictions independent of MCL § 770.1. This authority is provided both by the Michigan Constitution and by statute.

3. The Court's authority with regard to motions for new trial and postconviction review

It is often forgotten that there are statutes and constitutional provisions concerning the authority of this Court with regard to the *jurisdiction* of the circuit court. Of course, the practice and procedure provision, 1963 Mich. Const. Article 6, § 5, gives this Court authority to "establish, modify, amend and simply the practice and procedure in all courts." That provision has also been

implemented by the legislature, which has provided that the Court has authority to "prescribe the practice and procedure in . . . courts of record concerning . . . *the granting of new trials*."[5] Further, 1963 Mich. Const. Article 6, § 13, concerning the jurisdiction of the circuit court, provides that the circuit court's jurisdiction includes "original jurisdiction in all matters not prohibited by law," and also "jurisdiction of other cases and matters *as provided by rules of the supreme court*" (emphasis supplied). This provision has also been implemented by the legislature. The circuit court has the "power and jurisdiction" possessed by "courts of record at the common law, as altered by the state constitution of 1963, the laws of this state, *and the rules of the supreme court*"; "possessed by courts and judges in chancery in England on March 1, 1847, as altered by the state constitution of 1963, the laws of this state, *and the rules of the supreme court*;" and also simply jurisdiction as "[p]rescribed by "the rules of the supreme court."[6] Article 6, § 13—and as implemented by the legislature, though no such implementation was required—gives this Court authority over the circuit courts with regard to their "power and jurisdiction," which may be controlled by *rules prescribed* by the Court. "Jurisdiction" is generally viewed as a court's authority to hear and determine a case.[7]

This Court under both its practice and procedure power, and its power under Article 6, § 13 to provide jurisdiction to the circuit courts in such "other cases and matters as provided by rules of the supreme court," as well as the authority granted in MCL § 600.601 to provide such "jurisdiction and power" to the circuit court as it may by rule prescribe, and its authority under MCL § 600.223 to "prescribe the practices and procedure" of the circuit court "concerning the granting of new trials,"

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[5] MCL § 600.223(2)(c)(emphasis supplied).

[6] MCL § 600.601 (emphasis added).

[7] See e.g. *Ward v Hunter Machinery*, 263 Mich 445 (1933).

thus has ample authority to create the motion for relief from judgment practice, prescribe its practice and procedure, and set the conditions upon which the motion may be granted. It further has power and authority to amend in some ways the procedure to be followed under MCL § 770.2 regarding motions for new trial in cases appealable of right (principally matters of timing[8]). MCL § 770.1 provides no independent basis for review of convictions after the appeal of right is had or forfeited. This Court can create a system for post-appeal review, and has done so with the motion for relief from judgment rules. *They* govern this matter.

C. The test set forth in *People v Cress* for determining whether a defendant is entitled to a new trial based on newly discovered evidence applies in determining whether a second or subsequent motion for relief from judgment is based on "a claim of new evidence that was not discovered before the first such motion" under MCR 6.502(G)(2)

1. The framework of the motion for relief from judgment edifice

Absent the motion for relief from judgment court-rule scheme promulgated by the Court—based at least in part on proposals made by the Court's Criminal Procedure Rules Committee, submitted in April of 1987—Michigan had no method of post-appeal review, at least when MCL § 770.1 is properly read in conjunction with MCL § 770.2 to apply only to cases appealable by right. This Court intended that the motion for relief from judgment provide the *sole*

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[8] See for example, MCR 6.431(a) (a timely motion is to be made, or an extension sought, within 42 days, rather than 60); MCR 6.431(A)(2), MCR 7.208(B) (a motion may be made even after a claim of appeal is filed, if made within the time for filing the appellant's brief, which is 56 days after the transcript is filed); MCR 6.431(A)(2), MCR 7.211(C)(1) (a motion for new trial may be filed on a motion to remand granted by the Court of Appeals, filed after the time for filing a motion under MCR 7.208(B) has expired); MCR 6.431(A)(3) (where the appeal of right is forfeited, a motion for new trial may be filed within 6 months after the entry of the judgment of sentence). The motion for new trial filed under MCR 6.431(A)(3) is not in a case appealable as of right, as the appeal of right has been forfeited, and is thus not authorized by MCL § 770.2. But it *is* authorized by a rule of this Court, and this Court has constitutional authority to so authorize under Article 6, § 13 concerning the jurisdiction of the circuit court, as "provided by the rules of the supreme court."

method of review of convictions after the direct appeal is over, providing at the outset in MCR 6.501 that "Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed *only in accordance with the provisions of this subchapter*" (emphasis supplied).[9]

The scheme created is not simply a second appeal of right, but accords meaning and consequences to the appeal of right, and recognizes the importance of principles of finality. As the United States Supreme Court has observed:

> Once the defendant's chance to appeal has been waived or exhausted . . . we are entitled to presume he stands fairly and finally convicted . . . . Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, a final judgment commands respect.
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> For this reason, we have long and consistently affirmed that a collateral challenge may not do service for an appeal.[10]

And as this Court has said:

> The [motion for relief from judgment] rules present a carefully balanced scheme that liberally permits the assertion of claims on direct appeal, whether timely or not, while at the same time introducing a concept of finality to discourage repeated trips up and down the appellate ladder.
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> In explaining the proper standard for collateral postconviction relief, the drafters of proposed rule 7.404, later adopted as MCR 6.508, stated:
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> > The collateral postconviction remedy provided by subchapter 7.400 *should be regarded as*

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[9] See the proposed Committee 7.401, which is virtually identical. *Proposed Rules of Criminal Procedure*, 428A Mich. 39 (1987).

[10] *United States v. Frady*, 456 U.S. 152, 164-165, 102 S. Ct. 1584, 1592-1593, 71 L. Ed. 2d 816 (1982).

> *extraordinary*. Lacking any statute of limitations, this remedy has the potential for seriously undermining the state's important interest in the finality of criminal judgments. Such a cost is appropriate *only to prevent manifest injustice*. Stated differently, collateral postconviction remedies should have a narrower role than direct appeal; errors that may warrant appellate reversal of a conviction may not warrant postconviction relief. [Proposed Rules of Criminal Procedure, 428A Mich 50 (1987).][11]

Thus, after the direct appeal is completed or forfeited, the defendant may not relitigate grounds for relief that were decided against him or her in a prior appeal*, or a prior motion for relief from judgment*, unless the defendant establishes that a retroactive change in the law has undermined the prior decision.[12] Further, the defendant may not allege grounds for relief, other than jurisdictional defects, that *could have been* raised on direct appeal from the conviction and sentence, *or in a prior motion for relief from judgment*, absent the convergence of two showings: first, good cause for failure to raise these grounds on appeal, *or in the prior motion*, and second, actual prejudice from the alleged irregularities that support the claim for relief.[13] Demonstrating that the purpose of the motion for relief from judgment is not simply to provide a second direct appeal, prejudice is defined—here, only the definition for trial error will be mentioned—more strictly than prejudice for an error on direct appeal: in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal, with a "safety valve" provision that relief may be granted in any case, where the irregularity was so offensive to the maintenance of a sound

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[11] *People v. Reed*, 449 Mich. 375, 388-389 (1995) (opinion of Justice Boyle) (emphasis supplied).

[12] MCR 6.508(D)(2).

[13] MCR 6.503(D)(3).

judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case.[14]

MCR 6.502(G) permits a second or successive motion only in very limited circumstances. After all, if a first post-conviction review is for "extraordinary cases," a second or subsequent review should be reserved for the outer range of the extraordinary, with a focus on innocence. "A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment *or a claim of new evidence* that was not discovered before the first such motion." Though a showing of cause for not having raised the claim previously is not contained in the language of MCR 6.502(G), the provision *is* subject to the cause and prejudice requirements of MCR 6.508(D)(3), as that rule specifically applies to successive motions, relief being unavailable to a motion that "alleges grounds for relief, other than jurisdictional defects, which could have been raised . . . in a prior motion under this subchapter," unless the defendant demonstrates both cause and prejudice as defined in the rule, arising from the only two sorts of claims allowed under MCR 6.502(G)(2): a retroactive change in law occurring after the first motion for relief from judgment, or a claim of new evidence not discovered before the first motion.

A defendant filing a second or successive motion for relief from judgment, then, raising a "claim of new evidence not discovered before the first motion," must show cause for failing to raise the claim if it could have been raised on direct appeal or the earlier motion. A defendant who could have discovered the evidence with reasonable diligence cannot, amicus submits, show cause; the *Cress* standard, then, is not only historically required for claims of new evidence, but also implicit in the cause requirement. The court may waive the "good cause" requirement if it concludes that

[14] MCR 6.508(D)(3)(b).

there is a significant possibility that the defendant is innocent of the crime.[15] What this means amicus will return to subsequently. But in all events, the *Cress* requirements remain.

2. The *Cress* standard for newly discovered evidence applies to MCR 6.502(G)(2)

Cress is *itself* a motion for relief from judgment case,[16] defendant raising a claim of newly discovered evidence, a third-party confession, to which this Court applied the ordinary principles of newly discovered evidence claims to the claim of new evidence brought there in a first motion for relief from judgment.[17] This Court elucidated the standard for claims of newly discovered evidence:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial.[18]

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[15] MCR 6.508(D)(3).

[16] "We granted leave to appeal to consider whether the trial court abused its discretion in denying defendant's motion for relief from judgment on the basis of a new, third-party confession." *People v. Cress*, 468 Mich. 678, 680 (2003).

[17] The application of traditional newly discovered evidence requirements to motions for relief from judgment, and successive motions for relief from judgment, has been routine. See e.g. *People v. Hess*, 495 Mich. 921 (2014) ("The trial court abused its discretion in denying the defendant's motion for relief from judgment based on MCR 6.502(G) without assessing whether the newly discovered evidence would make a different result probable on retrial. *People v. Cress,* 468 Mich. 678, 682, 664 N.W.2d 174 (2003)"); *People v. Grissom*, 492 Mich. 296 (2012) (trial court abused its discretion in denying defendant's motion for relief from judgment based on newly discovered evidence impeaching credibility of rape victim); *People v. Chambers*, 482 Mich. 980 (2008) ("This order does not prevent the defendant from filing a second motion for relief from judgment based on newly discovered evidence under MCR 6.502(G)(2)"). MCR 6.502(G)(2) is not a "gateway," then, it *is* a claim of newly discovered evidence, as traditionally understood.

[18] *People v. Cress*, 468 Mich. at 692. This is a common statement of the standard for claims of newly discovered evidence. See e.g. *United States v. Jernigan*, 341 F.3d 1273, 1287

The Court found that the trial court had not abused its discretion in denying the motion.

a. MCR 6.502(G)(2)'s "new evidence" provision is not a gateway for the raising of substantive claims, but, outside of claims of retroactive changes in the law, is itself a "claim," and the only other one permitted under the rule

Defendant, ignoring the fact that MCR 6.508(D)(3) applies to successive motions for relief from judgment by its terms, argues that as a matter of the plain text of MCR 6.502(G)(2) no "reasonable diligence" requirement exists for filing a subsequent motion for relief from judgment, as the text only refers to a claim of new evidence not discovered before the first motion, not a claim of new evidence that could not have been discovered with reasonable diligence. Defendant reads the rule as a "procedural gateway" allowing the raising of "any number of potential underlying *substantive* claims," one of which *might*—but need not—be claim of newly discovered evidence, to which *Cress does* apply, the rule allowing *any* substantive claim relying on evidence not discovered

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(CA 11, 2003) ("To succeed on a motion for new trial based on newly discovered evidence, the movant must establish that (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result"). Some decisions add that motions for new trial based on newly discovered evidence are *highly disfavored* and should be granted only with great caution. See *United States v. Campa*, 459 F.3d 1121, 1151 (CA 11, 2006).

The test also has roots in Michigan jurisprudence:

> A motion for a new trial, upon the ground of newly discovered evidence, is not regarded with favor. The policy of the law is to require of parties care, diligence and vigilance in securing and presenting evidence. . . . To entitle one to a new trial upon this ground it should be shown: First, that the evidence, and not merely its materiality, to newly discovered; second, that the evidence be not cumulative merely; third, that it be such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial.

People v. Purman, 216 Mich. 430, 439 (1921)

before the first motion for relief from judgment to be raised without regard to any default in the discovery of the evidence.[19] Defendant misreads the rule, taking it to read as does the federal rule.

The federal relief from judgment statute, 28 USC § 2244, contains limitations on second or successive petitions. The statute requires dismissal of "a claim presented" in a second or successive petition that was not presented in a prior petition unless "the applicant shows that the claim relies on a new rule of *constitutional law,* made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or *the factual predicate for the claim* could not have been discovered previously through the exercise of due diligence; and the facts *underlying the claim*, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, *but for constitutional* error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[20] And so the new claim based on a *factual predicate* of new evidence—that could not have been discovered previously with due diligence—is limited to constitutional claims, and relief is precluded unless it can be established by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have convicted.

The federal statute thus allows *any* claim of constitutional error where the "*factual predicate*" for the claim is new evidence that could not have been discovered previously with reasonable diligence. That is not the Michigan rule. MCR 6.502(G) allows a second or subsequent motion based on "*a claim of new evidence* that was not discovered before the first such motion." The rule says a "*claim of new evidence*," not, as the federal rule does, a constitutional claim with a *factual predicate* of new evidence. Federally, a defendant may file a successive petition, then, which can

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[19] Defendant's Brief, p. 18.

[20] Internal section lettering and numbering omitted; emphasis added.

be based on a constitutional claim where the factual predicate for the *claim* could not have been discovered with due diligence; in Michigan, a defendant may only file a successive motion—laying aside here claims of retroactively applicable new rules of law—where *the claim is itself a claim of new evidence*.[21] MCR 6.502(G)(2) is not a gateway to the raising of any substantive claim, allowing not any claim based on new evidence, but a *motion* based on a *claim* of new evidence. Claims of new evidence have always been governed by the standard enunciated in *Cress*; indeed, defendant does not dispute that *Cress* applies to claims of newly discovered evidence brought under MCR 6.502(G)(2),[22] but instead argues that so long as the claim—*any* claim—brought is based on new evidence, whether that evidence could have been discovered with reasonable diligence or not, the claim is allowed by the rule. Defendant argues her claim is thus permitted without regard to whether she could have discovered the factual predicate with reasonable diligence because her claim is not a claim of newly discovered evidence, but instead her "substantive claim is a constitutional violation under *Brady v Maryland*. . . ."[23] Again, the rule does not, as does the federal statute, refer to the

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[21] One salient reason that defendants must argue for creation of a "freestanding" claim of actual innocence in the federal system on successive petitions is because claims seeking a new trial on the traditional basis of newly discovered evidence—a "freestanding" claim of innocence—are barred after three years. See Fed. Rules Crim. Proc. Rule 33(B)(1): "b) Time to File. (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case." Because the successive petition provisions in federal statute refer to new factual predicates for constitutional claims, unless a "freestanding" claim of innocence is an independent constitutional claim, it will generally be time-barred if raised on post-conviction review. On the other hand in Michigan, as amicus argues, claims of new evidence, along with retroactivity claims concerning new decisions, are the *only* sort allowed, and they include *Brady* claims.

[22] Defendant's Brief, p. 19 ("The underlying substantive claim might be, *or it might not be*, a claim under *Cress* . . . .) (emphasis in the original).

[23] Defendant's Brief, p. 19.

discovery of evidence supplying the factual predicate for a new claim, but a claim itself of new evidence. Claims of newly discovered evidence are governed by the *Cress* standard.

The requirement that defendant show cause for not having raised the issue in the prior motion or motions further buttresses the requirement of reasonable diligence. Again, though MCR 6.502(G)(2) does not refer to reasonable diligence, claims raised in successive petitions are, as amicus has noted, subject to the requirement of MCR 6.508(D)(3) that relief cannot be granted unless good cause is shown for not having raised the issue "in the prior motion." When the claim is one of newly discovered evidence, cause for not having raised the claim in the prior motion cannot be shown where the evidence could have been discovered before the prior motion with reasonable diligence. Further, MCR 6.502(A) requires that a successive motion "must specify all of the grounds for relief which are available to the defendant and of which the defendant has, *or by the exercise of due diligence, should have knowledge*." Amicus will return to the possibility of the waiver by the trial court of the showing of cause under MCR 6.508((D)(3) "if it concludes that there is a significant possibility that the defendant is innocent of the crime."

b. An actual probability of acquittal under the newly discovered evidence standard is a showing that it is more likely than not that no reasonable juror would have convicted

Surprisingly, there is very little discussion in the cases as to what is meant by the requirement that newly discovered evidence must make an acquittal "probable." But it is clear that the standard is a different one from that required for relief under *Brady*, and requires demonstration of an "actual probability" of an acquittal. The United States Supreme Court has noted the difference between the two standards:

> the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. *For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal*. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.[24]

And so the "materiality" component for *Brady* requires a showing of a "reasonable probability" of a different result had the evidence been heard by the jury, meaning a showing "sufficient to undermine confidence in the outcome,"[25] which is understood as a lesser requirement than that of newly discovered evidence, where a probability of acquittal is required.

The distinction is recognized not only in *Agurs*, but in other cases applying the principles of newly discovered evidence. It is said that "the fourth prong of the [newly discovered evidence] test requires an 'actual probability that an acquittal would have resulted if the evidence had been available'"[26]; "[i]n the absence of a *Brady* violation . . . the defendant must meet the more onerous standard of showing an 'actual probability that an acquittal would have resulted if the evidence had been available'"[27]; [i]f, however, the motion is . . . based on newly discovered evidence that does not involve an alleged *Brady* violation, then the standard is more onerous for defendants, and defendant

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[24] *United States v. Agurs*, 427 U.S. 97, 111, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342 (1976) (emphasis supplied).

[25] "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985).

[26] *United States v. Del-Valle*, 566 F.3d 31, 38 (CA 1, 2009).

[27] *United States v. Casas*, 425 F.3d 23, 53 (CA 1, 2005).

must show the new material evidence 'will probably result in an acquittal.' . . . This means an 'actual probability that an acquittal would have resulted if the evidence had been available.'"[28] If, then, there must be shown an "actual probability" of an acquittal had the new evidence been presented, this means more than that the evidence *could* have raised a reasonable doubt, but must mean that it is probable that *all* jurors *would* have entertained a reasonable doubt. Put another way, it must be shown that it is more likely than not that no reasonable juror would have convicted.[29]

3. Conclusion

MCR 6.508(D)(3)'s cause requirement provides a gateway on a *first* motion for relief from judgment to the raising of any claim, so long as the prejudice standard can be met, and the "actual innocence" provision, to which amicus will return, supplies an alternative gateway which waives cause. But MCR 6.502(G)(2) is *not* a gateway to any and all substantive claims; being a second or successive motion beyond the appeal of right, it is, aside from retroactivity of new rules claims, limited to the raising of claims of newly discovered evidence, and the requirement of cause for not having raised the issue previously coalesces with the ordinary requirement that diligence must be shown. Defendant argues that if this is what the rule says—and it is—then it would foreclose his *Brady* claim, and defendant's claim here is not a *Cress* claim—his newly discovered evidence appeal is over, and he did not prevail—but a *Brady* claim. But it would not. Properly construed, *Brady* claims *are* claims of newly discovered evidence.

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[28] *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 20 (CA 1, 2001).

[29] See *People v. Grissom*, 492 Mich. 296, 352 (2012): "Whatever exculpatory theory defendant might offer to explain the newly discovered evidence, he simply has not established that a jury would more likely accept that theory than the prosecution's explanation . . . ."

D. The defendant is not entitled to a new trial as there was no violation of the rule set forth in *Brady v Maryland*[30]

1. *Brady* claims are a class or species of new evidence claims

Defendant argues that *Cress* should not be "grafted" onto "underlying substantive *Brady* claims."[31] But MCR 6.502(G)(2), requiring that the *claim* be one of new evidence, which defendant must show cause for not having raised before the first motion, meaning that it could not have been discovered with reasonable diligence, does not bar *Brady* claims, for, properly understood, *Brady* claims are a species of newly discovered evidence.[32] A *Brady* claim is not an "underlying substantive" claim based on a factual predicate of new evidence, it *is* a claim of new evidence.

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[30] *Brady v Maryland*, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963).

[31] Defendant's Brief, p. 23.

[32] See *United States v. Heriot*, 496 F.3d 601, 604-605 (CA 6, 2007): "The Defendant advances the present motion pursuant to Rule 33(b)(1) citing . . . newly-discovered evidence . . . . To warrant a new trial on the basis of newly-discovered evidence, the Defendant generally must establish: '(1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal.'. . . However, the defendant's burden is less rigorous *where . . . the new evidence is exculpatory evidence which the Government failed to turn over* in violation of the requirements of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To warrant a new trial arising from a *Brady* violation, (1) 'the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;' (2) 'that evidence must have been suppressed by the [government], either willfully or inadvertently;' and (3) 'prejudice must have ensued.' . . . Prejudice (or materiality) is established by showing that 'there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.'. . . 'A reasonable probability is one sufficient to undermine confidence in the outcome'" (emphasis supplied).

Compare the standards.

Newly discovered evidence	*Brady*
A defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes an acquittal probable on retrial.	A defendant must show that: (1) the prosecution has suppressed evidence; (2) that the evidence is favorable to the defendant; and (3) the evidence that is material; that is, there is a reasonable probability of a different result had the evidence been presented, which does not mean that it is more likely than not that defendant would have received different verdict with the evidence, but confidence in the outcome of trial is undermined.[33]

A showing of diligence is required here because this is a successive motion for relief from judgment, and if the claim could have been brought in a prior motion then MCR 6.508(D)(3) requires a showing of cause for failure to do so.[34] If defendant with diligence *could* have brought the claim

[33] *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

[34] Further, to say that *People v. Chenault*, 495 Mich. 142 (2014) absolves the defendant of any duty to act diligently in the discovery of exculpatory evidence is not quite true; this Court removed diligence as a "prong" of the test, but said also that "We believe that the concerns that a diligence requirement might address *are already confronted in the context of Brady's suppression requirement* . . . ." *People v Chenault*, 495 Mich. at 153 (emphasis supplied). The Court further stated that "evidence that the defense knew of favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim." *People v Chenault*, 495 Mich. at 155. In order to show that evidence was actually "suppressed" under the suppression prong of *Brady*, cases are legion that "[e]vidence is not considered to be suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *Wilson v. Beard*, 589 F.3d 651, 663 (CA 3, 2009). See also 3 *Federal Practice and Procedure Criminal* § 586; Orfield *Criminal Procedure Under the Federal Rules* § 33:16 ("No suppression of exculpatory evidence occurs . . . where defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of the evidence"); 6 LaFave *Criminal Procedure 3d* § 24.3(b) ("undisclosed favorable and material information . . . is not 'suppressed' in violation of *Brady* if the defendant knew of it or could have obtained it with reasonable effort"). And see attachment A.

previously, then cause does not exist; if he could not have—if, as he says, "the prosecution succeeded in *suppressing* the exculpatory evidence *until after* she filed her first 6.500 motion"[35]—then cause is shown. This is not simply a *Brady* "new evidence" claim, but a *Brady* "new evidence" claim brought in a successive motion for relief from judgment, and that matters under the rules. In any event, the claim is one of "new evidence," and its effect on the verdict. A *Brady* claim thus may be brought under MCR 6.502(G)(2), so long as cause is shown under MCR 6.508(D)(3) for not bringing it previously (which "successful suppression" would establish, and suppression itself is a *necessary* part of a *Brady* claim). Here defendant's claim fails because he cannot demonstrate the suppression requirement of *Brady*.

2. Defendant's *Brady* claim fails

Both the Court of Appeals and the People have well laid out why defendant's *Brady* claim fails, and amicus will not long belabor the point. First, the timing of the claim here should cause its consideration with great caution. The claim that Book had a conversation with Detective Picketts where he indicated he was present in the home during the times of the alleged abuse and saw nothing was raised only after Detective Picketts died. The other participant to the supposed conversation, then, was unavailable for the hearing, and Book's testimony that the conversation occurred is uncorroborated. And as the Court of Appeals said in its opinion, what Book said to Picketts, even if the conversation occurred, is not evidence at all; further, because Book lived with defendant at the relevant times—allegedly—she quite obviously knew that he could testify favorably. Because the two had not parted amicably, it was believed by the defense that Book would not be a good witness, but no attempt to subpoena him and place him under oath as to the events in question was made. As

[35] Defendant's Brief, p. 23.

the Court of Appeals said, "That defendant ultimately opted, as a strategic decision, not to call Book because of his hostility toward her does not render his information newly discovered."[36] Defendant's claim becomes simply that she did not expect that if she called Book he would tell the truth (as she says the truth is), and so did not call him. But she was certainly aware that—in her version of the truth—Book was present at relevant times[37] and could provide useful testimony, and so his version of events now is not newly discovered.

Defendant says that the Court of Appeals application of *Brady* is incorrect because it would "lead to the opposite result in *Brady* itself."[38] But Brady involved a codefendant, each defendant blaming the other for the actual strangulation death of the victim during the robbery. Brady knew that his codefendant had accused him of the strangulation, as the prosecution had turned over to his counsel statements of the codefendant so saying.[39] Brady had great reason—given the statements of his codefendant that were disclosed to him—to believe that had he called his codefendant the codefendant would have accused him of the strangling—as he undoubtedly would have. It was not the testimony of the codefendant that was newly discovered, but his confession, a confession that

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[36] *People v. Swain*, No. 314564, 2015 WL 521623, 3 (2015).

[37] *People v. Swain*, No. 314564, 2015 WL 521623, 2.

[38] Defendant's Brief, p. 27.

[39] "At the trial of Boblit [the codefendant] the State offered the unsigned statement of Boblit in which he admitted strangling the victim. The court excluded it because it was unsigned. In several prior statements Boblit had stated that Brady did the killing and so testified on the stand. *These statements were made available to Brady's counsel before trial, but the one in which Boblit said that he had done the actual killing was not so made available.* At the trial of Brady the unsigned statement of Boblit was not produced by the State nor offered in evidence." *Brady v. State*, 174 A.2d 167, 169 (Maryland, 1961) aff'd, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

the Maryland court found admissible under the circumstances, though on the question of punishment only, the refusal to grant a new trial being *affirmed* by the United States Supreme Court. Here, no statements of Book accusing the defendant were made and disclosed to the defense, so as to lead the defense to think Book would accuse the defendant if called, and, of course, even if the call between Book and Detective Picketts occurred the conversation was not admissible. The situations are simply not comparable.

E. Where pertinent to waiving the requirement of cause, a "significant possibility of actual innocence" should be viewed as a showing that it is more likely than not that no reasonable juror would have convicted, taking the new evidence together with the evidence presented at trial[40]

As stated, MCR 6.508(D)(3) applies to successive motions brought under MCR 6.502(G)(2), as MCR 6.508(D)(3) requires a showing of cause when the claim "could have been raised . . . in a prior motion under this subchapter." Relief is barred by MCR 6.508(D)(3), which applies to successive motions by expressly referring to claims that could have been brought in prior motions in the motion for relief from judgment chapter, unless cause is shown, but the safety valve of MCR 6.508(D)(3) also then applies: "The court may waive the 'good cause' requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime." And so defendant's *Brady* claim of new evidence can be brought, even if it could have been

[40] As amicus explains, this *is* the fourth prong of the newly discovered evidence test, and if it can be met, along with the other requirements of the test, then defendant prevails on a MCR 6.502(G)(2) claim of new evidence. In this sense, Michigan *has* a "freestanding" claim of innocence that can be brought on a successive motion. But defendant's claim here is a different sort of claim of new evidence, a *Brady* claim, which also can be brought under MCR 6.502(G)(2) if the requirements of that claim are met. Defendant's claims of newly discovered evidence, have been rejected by the Court of Appeals, with leave denied by this Court, which is the law of the case here. See *People v. Swain*, 288 Mich. App. 609 (2010), lv. den. 488 Mich. 992 (2010), reconsideration denied, 489 Mich. 902 (2011).

brought in a prior motion—defendant could have discovered it—if he can show that "there is a significant possibility that the defendant is innocent of the crime." This Court has asked by what standard a "significant possibility that the defendant is innocent" is to be gauged. Here, amicus believes that the *Brady* claim *can* be raised, but simply fails. Defendant loses under *Brady*, not because his claim cannot be considered; the Court of Appeals *did* consider it, and rejected it.

But where the question is pertinent—which is generally in a *first* motion for relief from judgment, where a showing of cause, or its waiver by a showing of a significant possibility that the defendant is innocent, is a gateway to the consideration of *any* substantive claim, as opposed to a successive motion for relief from judgment where, apart from claims of retroactivity of new decisions, the only raisable claims, even with a showing of cause or its waiver by a showing of a significant possibility of actual innocence, are claims of new evidence under *Cress* or *Brady*—the waiver of cause is shown by a demonstration that the *new evidence* makes it more likely than not that no reasonable juror would have convicted[41]—and this is the *Cress* fourth prong in any event.

This Court's Criminal Procedure Rules Committee stated in 1987 that the "actual innocence" exception to the good-cause requirement was based on the United States Supreme Court decision in *Murray v Carrier*.[42] In *Carrier*, the state petitioner's appellate attorney had allegedly forgotten to raise a *Brady* issue regarding statements by the rape victim which the prosecution did not turn over to the defense. Setting aside the merits, however, the Supreme Court held that the prisoner's habeas petition had to be rejected because he could not establish cause for the default, unless on remand he could establish that the victim's statements established his "actual innocence." The

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[41] See *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1933, 185 L. Ed. 2d 1019 (2013).

[42] *Murray v Carrier*, 477 US 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

Committee commentary cited *Carrier* in explaining that "subrule (C) permits the court to waive the good cause requirement if the petitioner makes a colorable claim that he is actually innocent of the crime." The commentary quotes *Carrier* verbatim: "Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[43] Michigan's actual-innocence exception is thus intended to be equivalent to its federal counterpart, despite the minor linguistic differences.[44]

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[43] *Proposed Rules of Criminal Procedure*, 428A Mich. at 54), quoting *Carrier* at 106 S.Ct at 2649.

[44] For whatever reason, this Court changed the Committee's recommended wording of the Rule before adoption, changing "colorable claim that [the petitioner] is actually innocent of the crime" to "significant possibility that the defendant is innocent of the crime." While the Court has never indicated whether the change signified a different meaning or merely a clarification of the *Carrier* standard, the latter is most likely, given the principle that when interpreting a court rule, courts "must be mindful of the surrounding body of law into which the provision must be integrated." *Haliw v. Sterling Heights,* 471 Mich. 700, 706 (2005), quoting *Green v. Bock Laundry Machine Co*, 490 U.S. 504, 528, 109 S.Ct. 1981, 104 L.Ed. 2d 557 (1989) (Scalia, J, concurring) (internal punctuation omitted). Further, "[i]t is appropriate to look to federal case law when interpreting a state [rule] which parallels its federal counterpart." *State Employees Ass'n v. Department of Management and Budget,* 428 Mich. 104, 117 (1987). A final principle of construction is that an alteration in wording does not necessarily imply a difference in meaning: the Court "might simply have found a better way than the drafters of [the Rule] to express the same proposition." See generally *Jarrad v Integon Nat Ins Co*, 472 Mich. 207, 222 (2005) (construing Michigan no-fault insurance law where it differs from the model Uniform Motor Vehicle Accident Reparations Act). In short, absent an express desire to alter the federal law from which the actual-innocence exception was derived, the Court should presume that the standards are the same. See generally *People v. Moreno,* 491 Mich. 38, 41 (2012) (Legislature will not be found to have altered underlying common law unless signified "in no uncertain terms.")

A "colorable claim" appears to be a short-hand expression for the *Carrier* standard, which this Court rephrased as a "significant possibility that the defendant is innocent." See *Teague v. Lane*, 489 U.S. 288, 313, 109 S. Ct. 1060, 1077, 103 L. Ed. 2d 334 (1989)

In order to meet the "actual innocence" alternative to cause under MCR 6.508(D)(3), then, the defendant must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial."[45] This new evidence must be reliable, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."[46] The defendant must demonstrate, by a preponderance of the evidence, that given the new evidence no reasonable juror would have voted to convict.[47] Further,

> The *Carrier* standard is intended to focus the inquiry on actual innocence. In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. . . .
>
> The meaning of actual innocence as formulated by . . . *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.
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> We note finally that the *Carrier* standard requires a petitioner to show that it is more likely than not that "no reasonable juror" would have convicted him. The word "reasonable" in that formulation is not without meaning. It must be presumed that a reasonable juror would

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[45] *Schlup v. Delo*, 513 U.S. 298, 327-28, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808 (1995) (CHECK)

[46] *Id.* at 324.

[47] *Id.* at 327.

> consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt.[48]

Finally, is there, independent from MCR 6.508(D)(3), a "freestanding" claim of actual innocence?

F. Principles of due process do not compel a "freestanding" claim of actual innocence; there is no actual innocence claim apart from claims of new evidence—including proper *Brady* claims—under MCR 6.502(G)(2), which are in effect claims of innocence under the rule

As amicus has discussed, unlike the federal statutory scheme for federal post-conviction review, the motion for relief from judgment structure limits successive claims to claims of retroactivity of new decisions, and claims of new evidence ("a claim of new evidence that was not discovered before the first such motion"). The federal scheme also limits review, there only to constitutional claims, and then only to those constitutional claims based on a factual predicate of new evidence that could not have been discovered earlier with due diligence. And relief may is strictly circumscribed, as relief may only be granted when it is shown "*by clear and convincing evidence* that, *but for the constitutional* error, no reasonable factfinder would have found the applicant guilty of the underlying offense." The newly discovered factual predicate is thus a gateway to a constitutional claim; the newly discovered evidence—which could not have been discovered previously with reasonable diligence—is not itself a constitutional claim.

But both a claim of newly discovered evidence under MCR 6.502(G)(2), and a claim of a *Brady* violation, *are* essentially "freestanding" claims of innocence sufficient to warrant ordering a new trial where the requirements to show each are met, the latter claim requiring a lower showing

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[48] *Schlup v. Delo*, 115 S. Ct. at 868.

as to innocence, given that the absence of the evidence at trial was caused, even when innocently or inadvertently, by the State. The former requires reasonable diligence, and a showing that the new evidence would probably result in an acquittal; that is, that it is more likely than not that no reasonable juror would have convicted if the new evidence had been presented at trial. *This is a less onerous standard than that generally proffered for a constitutionally-based freestanding claim of innocence.* The latter requires a showing of suppression of evidence by the prosecution, and that this new evidence creates a reasonable probability of an acquittal, meaning that confidence in the reliability of the outcome is sufficiently undermined to order a new trial.

The United States Supreme Court has never held that a claim of new evidence as an independent claim rather than as a gateway to consideration of a constitutional claim must be considered as itself a constitutional claim under principles of due process.[49] Michigan's due process provision is no broader than the federal constitutional provision.[50] It has been suggested that were such a constitutional claim under due process to be recognized—the suggestion arising in death-penalty cases most often—it would require, in some formulations of such a claim, that the defendant "would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of

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[49] See *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). And see See *In re Swearingen*, 556 F.3d 344, 348 (CA 5, 2009); *Fielder v. Varner*, 379 .F3d 113, (CA 3, 2004); *Johnson v. Bett*, 349 F.3d 1030, 1038 (CA 7, 2003); and *Burton v. Dormire*, 295 F.3d 839, 848 (CA 8, 2002). The Ninth Circuit in *Carriger v. Stewart*, 132 F.3d 463, 376 (CA 9, 1997) reviewed Carriger's actual-innocence claim *as if* there were a freestanding option, but ultimately decided that he did not meet it.

[50] See *People v. Sierb*, 456 Mich. 519, 523–524 (1998); *People v. Bosca*, 310 Mich. App. 1, 33 (2015).

guilt beyond a reasonable doubt.'"[51] But Michigan routinely[52] considers newly discovered evidence claims on motions for relief from judgment and successive motions for relief from judgment, and also *Brady* claims of new evidence, applying the standards for each claim. The probabilistic effect on the verdict for each of these claims of innocence is a lesser standard than has been suggested for a constitutional "freestanding" claim of actual innocence.[53] There is no need for this Court to consider whether such a claim exists, unless it considers amending the current rules.[54]

G. Conclusion

MCR 6.502(G)(2) allows only claims of retroactivity of new rules, and of new evidence. Claims of new evidence must satisfy the *Cress* standard, both because its requirements are the historic requirements, and because cause for not raising the claim previously must be shown, and claims of suppression of material evidence must satisfy the *Brady* standard. Both types of claims

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[51] *Herrera v. Collins*, 113 S. Ct. at 875 (White, J., concurring). To the same effect see *State v. Beach*, 302 P.3d 47, 53 (Mont., 2013)

[52] See footnote 16.

[53] Michigan statute also provides a "freestanding" claim of actual innocence under the DNA statute, MCL § 770.16. Under appropriate circumstances a defendant may receive DNA testing of biological material where that testing goes to actual innocence ("the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction"), and may gain relief on showing by clear and convincing evidence that "only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the identified biological material"; [t]hat the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation described in subsection (1)"; and "[t]hat the defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial."

[54] See Attachment B.

of new evidence are "freestanding," and allow relief on a lesser showing of innocence than suggested by formulations of a constitutional "actual innocence" rule. A showing of cause to raise these claims on a successive motion is required, but is met if the requirements of the standards are met, depending, as the case may be, which sort of claim is raised. But a showing of cause, or even its waiver by a showing that it is more likely than not that no reasonable juror would convict given the new evidence, taken together with the evidence presented, simply allows the raising of the new evidence claim, with its component requirements. Here the claim is a *Brady* claim, and whether cause is shown or waived, defendant must show suppression of material evidence by the prosecution, and has not. For that reason, his successive motion for relief from judgment fails.

Relief

Wherefore, amicus submits that the Court of Appeals should be affirmed.

Respectfully submitted,

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ATTACHMENT A: BRADY AND THE SUPPRESSION REQUIREMENT

States

Alabama

The government is not obliged to furnish information already known by the defendant, or information, evidence, or material that is available or accessible to the accused, which the defendant could obtain by exercising reasonable diligence.

Mashburn v. State, 148 So 3d 1094, 1120 (Ala.Crim.App.,2013)

Arizona

We also agree with the State that Brady does not require the State to disclose information that is also available to Escalante through the exercise of reasonable diligence.

State v. Escalante, 2008 WL 4662411, 6 (Ariz.App. Div. 1) (Ariz.App. Div. 1,2008)

Arkansas

Evidence is not "suppressed," pursuant to Brady, if the defendant either knew about it or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.

T.C. v. State, 364 S.W.3d 53 (Ark.,2010)

California

'[W]hen information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is [the defendant's] lack of reasonable diligence, the defendant has no Brady claim.

People v. Williams, 315 P.3d 1, 44 (Cal., 2013)

Delaware

The [State] will not be found to have suppressed material information is that information also was available to a defendant through the exercise of reasonable diligence.

Flonnery v. State, 893 A.2d 507, 532 (Del. Supr., 2006)

Florida

[T]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.

Wickham v. State, 124 S.3d 841, 851 (Fla., 2013)

Georgia

Fundamental to any error based upon a violation of Brady is that . . . the defense did not possess the evidence, nor could [defendant] obtain it himself with any reasonable diligence.

Biggins v. State, 744 S.E.2d 811, 818 (Ga.App., 2013)

Idaho

We complete our analysis of the Brady violation by addressing whether with due diligence the defense could have obtained Gifford's testimony.

Grube v. State, 995 P.2d 794, 8000 (Idaho, 2000)

Illinois

[F]or Brady purposes, evidence is suppressed if . . . the evidence was not otherwise available through the exercise of reasonable diligence.

People v. Franklin, 2013 WL 6961735, 20 (Ill.App., 2013)

Indiana

[T]he State will not be found to have suppressed material evidence if it was available to a defendant through the exercise of reasonable diligence.

Shelby v. State, 986 N.E.2d 345, 358 (Ind.App., 2013)

Iowa

Exculpatory evidence is not 'suppressed' if the defendant know or should have known of the essential facts permitting him to take advantage of the evidence.

Mark v. State, 568 N.W.2d 820, 823 (Iowa App., 1997)

Kansas

[E]vidence for Brady purposes is deemed 'suppressed' if . . . the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.

State v. Wilson, 200 P.3d 1283, 1292 (Kan.App., 2008)

Louisiana

Under the Brady rule, the State is not obligated to furnish a defendant with information he already has or can obtain with reasonable diligence.

State v. Dominick, 129 So.3d 782, 791 (La.App., 2013)

Mississippi

To make out a Brady claim, [defendant] has a burden to prove . . . that . . . the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence.

Jefferson v. State, 138 So.3d 263, 266 (Miss.App., 2014)

Missouri

Furthermore, there can be no Brady violation where the defendant knew or should have know of the material or where the information was available to the defendant from another source.

State v. Moore, 411 S.W.3d 848, 855 (Mo.App., 2013)

Montana

In order to establish a Brady violation, defendant must show. . . the defendant did not possess the evidence nor could he have obtained it with reasonable diligence.

State v. Parrish, 241 P.3d 1041, 1044 (Mont., 2010)

Nevada

Federal courts have consistently held that a Brady violation does not result if the defendant, exercising reasonable diligence, could have obtained the information.

Rippo v. State 946 P.2d 1017, 2028 (Nev., 1997)

North Carolina

[W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine.

State v. Allen, 731 S.E.2d 510, 524 (N.C.App., 2012)

North Dakota

To establish a Brady violation, the defendant must prove: . . . the defendant did not possess the evidence and could not have obtained it with reasonable diligence.

State v. Clark, 818 N.W.2d 739, 746 (N.D. 2012)

Tennessee

There is no Brady violation where a defendant know or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose.

Berry v. State, 366 S.W.3d 160, 179-180 (Tenn.Crim.App., 2011)

Texas

A Brady violation does not arise if the defendant, using reasonable diligence, could have obtained the information.

Meneffee v. State, 211 S.W.3d 893, 904 (Tex.App., 2006)

Utah

[W]e noted that 'courts universally refuse to overturn convictions where the evidence is known to the defense prior to or during trial, where the defendant reasonable should have known of the evidence.

State v. Pinder, 114 P.3d 551, 557 (Utah, 2005)

Vermont

Evidence is not 'suppressed' if the defendant either know, or should have know, of the essential facts permitting him to take advantage of any exculpatory evidence.

State v. Rooney, 19 A.3d 92, 97 (Vt., 2011)

Washington

If the nondisclosed information was available through the defense's own due diligence, there is no suppression under Brady.

State v. Mullen 259 P.3d 158, 170 (Wash., 2011)

West Virginia

Evidence is considered suppressed for Brady purposes when . . . the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.

State v. Youngblood, 650 S.E.2d 119 (W.Va., 2007)

Wisconsin

The government will not be found to have suppressed material information under Brady if that information was also available to the defense through the exercise of due diligence.

State v. Boyles, 1998 WL 142303, 2 (Wis.App., 1998)

Wyoming

[P]rosecution did not suppress . . . information for purposes of a Brady violation, where defense counsel was aware of rumor. . . .

Whiteney v. State, 99 P.3d 456 (Wyo., 2004)

Federal Circuits

1st Circuit

Brady does not require the government to turn over information which, 'with any reasonable diligence, [the defendant] can obtain himself . . . . (evidence is not 'suppressed' within the meaning of Brady if the defendant know or should have known of the 'essential facts permitting him to take advantage of any exculpatory evidence).'"

US v. Pandozzi, 878 F.2d 1526, 15-29-1530 (CA 1, 1989)

2nd Circuit

[U]nless DiSimone or his defense counsel either know, or should have known, of the essential facts permitting him to take advantage of [that] evidence . . . the government prejudicially violated its Brady obligations by failing to disclose information about another stabber until near the end of the prosecution's case.

DiSimone v. Phillips, 461 F.3d 181, 186 (CA 2, 2006)

3rd Circuit

It is true that Brady does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence. Evidence is not considered to be suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.

Wilson v Beard, 589 F.3d 651, 663 (CA 3, 2009)

4th Circuit

'The Brady rule does not apply if the evidence in question is available to the defendant from other sources,' thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it.

US v. Kelly, 35 F.3d 929, 937 (CA 4, 1994)

5th Circuit

Brady does not obligate the government 'to produce for [a defendant] evidence or information already known to him, or that he could have obtained from other sources by exercising reasonable diligence.

US v. Dixon, 132 F.3d 192, 199 (CA 5, 1997)

7th Circuit

E]ven if the government failed to disclose material evidence, the evidence is not 'suppressed' if the defendant knew of the evidence or could have obtained it through the exercise of reasonable diligence.

US v. Walker, 2014 WL 1193373, 4 (CA 7, 2014)

8th Circuit

There is no Brady violation if the defendant[], using reasonable diligence, could have obtained the information [himself].

US v. Ladoucer, 573 F.3d 628, 636 (CA 8, 2009)

9th Circuit

In determining whether evidence has been suppressed for purposes of Brady, our court has asked whether the defendant 'has enough information to be able to ascertain the supposed Brady material on his own.' If so, there's no Brady violation.

Mike v. Ryan, 711 F.3d 998, 1017 (CA 9, 2013)

10th Circuit

Brady does not oblige the government to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence.

US v. Kluger, 794 F.2d 1579, 1583 (CA 10, 1986)

11th Circuit

To obtain relief on his Brady claim, Ponticelli had to 'establish . . . the defendant did not possess the evidence and could not have obtained it with reasonable diligence.'

Ponticelli .v Secretary, Florida Dept. Of Corrections, 690 F.3d 1272, 1292 (CA 11, 2012)

Treatises

The Brady standard is often expressed in three prongs: (1) the evidence at issue is material and not favorable to the defendant; 92) the evidence was suppressed by the government, intentionally or not; and (3) the defendant was prejudiced to the point that there is a reasonable probability that the evidence suppressed, had it been discovered would have led to a different result for the defendant. The standard can also be split into four prongs, but the substance remains the same.

To establish a Brady violation, [defendant] must show . . . that the defendant did not possess the evidence nor could have obtained it himself with any reasonable diligence . . . .

3 Fed. Prac & Proc. Crim. (4th Ed.) § 586

No suppression of exculpatory evidence occurs, for purposes of a motion for new trial on the basis of a Brady violation, where defendant or his attorney knew, or should have know, of the essential facts permitting him to take advantage of the evidence.

Orfields Criminal Procedure Under the Federal Rules § 33:16

Even undisclosed and material information in the possession of the government is not 'suppressed' in violation of Brady if the defendant knew of it or could have obtained it with reasonable effort . . . . courts have held that the prosecutor's constitutional obligation was not violated, notwithstanding the nondisclosure of apparently exculpatory evidence, where the defense knew of the evidence and could have obtained it from a source other than the prosecutor.

6 LaFave Criminal Procedure (3rd Ed.) § 24.3

ATTACHMENT B: PROPOSED MODIFICATION OF MCR 6.501 ET SEQ BY COURT'S COMMITTEE TO REVIEW RULES OF CRIMINAL PROCEDURE (NOT ADOPTED BY THE COURT)

SUBCHAPTER 6.500: MOTION FOR RELIEF FROM JUDGMENT

RULE 6.501 SCOPE OF SUBCHAPTER

(A)Subchapter Only Method of Review For Judgments Not Subject to Appellate Review. Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court or the Recorder's Court for the City of Detroit not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.

(B)Subchapter Not Applicable. A judgment of conviction and sentence may not be reviewed under this chapter if

(1) the person filing the motion is not in custody pursuant to the judgment under which relief is sought; or

(2) the judgment of conviction and sentence is still subject to appellate review under subchapters 7.200 or 7.300.

(C)Consideration of Mislabeled Requests for Relief. A motion or other pleading seeking relief from the trial court from a judgment of conviction and sentence not subject to appellate review under subchapters 7.200 or 7.300 but not captioned as a motion brought under this subchapter shall be considered by the trial court as having been filed under this subchapter.

Committee Comment

Introduction

The purpose of MCR 6.500 as proposed by the original committee was to provide a "uniform procedure" for challenges to convictions made after exhaustion of the appeal of right. See Committee Note, 428A Mich at 40. Since that time, the question has been raised whether, given the existence of the motion for new trial statute, MCL 770.1, the Court has the power to create procedures and limitations apart from those contained in the statute. But when the statute is examined closely and in context, the question becomes not whether the Court can provide procedures and limitations for postappeal review of convictions that differ from the statute, but whether it has the authority to provide for the existence of postappeal challenges at all.

MCL 770.1, captioned "New trial; reasons for granting," provides:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done.

The statute must be read in context with MCL 770.2, which is captioned "New trial; time of motion," and provides, in pertinent part:

> (1) Except as provided in section 16, *in a case appealable as of right to the court of appeals*, a motion for a new trial shall be made within 60 days after entry of the judgment or within any further time allowed by the trial court during the 60-day period.
>
> *****
>
> (4) If the applicable period of time prescribed in subsection (1)... has expired, a court of record may grant a motion for a new trial for good cause shown. ....

The claim, then, that a "delayed motion for new trial" may, under the statute, be filed at any time, and repeatedly, ignores the provision that the motion for new trial exists only in a "case appealable as of right to the court of appeals." The authority to grant a motion for new trial at any time "on good cause shown" applies only in cases "appealable of right to the court of appeals." After the constitutional appeal of right is had or forfeited, any later motion for relief in the trial court–whatever it may be called–is no longer in a "case appealable of right to the court of appeals," there being only one appeal of right. Rather than there being a question regarding the authority of the Court to limit postappeal motions for new trial, there is a question regarding the authority of the Court to *authorize* postappeal review of convictions.

The Court *does*, however, have the authority to create a system of postappeal review of convictions independent of MCL 770.1. This authority is provided both by the Michigan Constitution and by statute.

_____■ **Article 6, § 5**: This provision delegates to the Supreme Court the authority to "establish, modify, amend and simply the practice and procedure in all courts." The provision has also been implemented by the legislature, which has provided that the Court has authority:

> ◆ To prescribe the practice and procedure in...courts of record concerning...*the granting of new trials*.
>
> MCL 600.223(2)(c)(emphasis supplied).

Article 6, § 13: This provision establishes the jurisdiction of the circuit court as including "original jurisdiction in all matters not prohibited by law," and also "jurisdiction of other cases and matters *as provided by rules of the supreme court*" (emphasis supplied). The provision has also been implemented by the legislature–the circuit court has the "power and jurisdiction":

- Possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state, *and the rules of the supreme court.*
- Possessed by courts and judges in chancery in England on March 1, 1847, as altered by the state constitution of 1963, the laws of this state, *and the rules of the supreme court.*
- *Prescribed by the rules of the supreme court.*

MCL 600.601.

Article 6, § 13–and as implemented by the legislature–gives the Supreme Court authority over the circuit courts with regard to their "power and jurisdiction," which may be controlled by *rules prescribed* by the court. "Jurisdiction" is generally viewed as a court's authority to hear and determine a case. See e.g. *Ward v Hunter Machinery*, 263 Mich 445 (1933).

The Supreme Court, under both its practice and procedure power, and its power under Article 6, § 13 to provide jurisdiction to the circuit courts in such "other cases and matters *as provided by rules of the supreme court,*" as well as the authority granted in MCL 600.601 to provide such "jurisdiction and power" to the circuit court as it may by rule prescribe, and its authority under MCL 600.223 to "prescribe the practices and procedure" of the circuit court "concerning the granting of new trials," thus has ample authority to create the motion for relief from judgment practice, prescribe its practice and procedure, and set the conditions upon which the motion may be granted.

Paragraph (A). Paragraph (A) continues the language from the current 6.501.

Paragraph (B). (1) This subchapter is designed as a safety valve after the appeal of right is over, and is reserved for "outcome-affecting" errors. Scarce resources should be allocated to this function, the Committee believes, only when it affects someone who is incarcerated. (2) Current MCR 6.508(D)(1) includes the provision that "The court may not grant relief to the defendant if the motion...(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300...." This limitation is moved forward to make clear at the outset that convictions still subject to appellate review may *not* be reviewed under this subchapter.

Paragraph (C). Before the amendments to the federal habeas corpus statute it was common practice where a *pro se* motion for postappeal relief in a federal prosecution was mislabeled for the district court to simply treat the pleading as a proper motion and consider it on the merits. But with the creation of a rule against successive petitions, consideration of a mislabeled petition as a petition under § 2255 precludes a second petition, unless the petition falls within certain exceptions. A number of federal circuits, see for example, *Castro v United States*, 277 F3d 1300 (CA 11, 2002), now require that the movant be given notice that the petition must be considered under § 2255, disabling the movant in most cases from a successive petition, or withdrawn. This rule applies only to *pro se* petitions.

Because of changes made to rule 6.508, the successive motion limitation of 6.502(G) has been deleted, and the concern in the federal system thus does not exist under the proposed revisions, and there is no reason to create a procedure that requires hard-pressed circuit courts to do other than treat mislabeled motions for what they are–motions for relief from judgment.

RULE 6.502 MOTION FOR RELIEF FROM JUDGMENT

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

(B) Limitations on Motion. A motion may seek relief from one judgment only. If the defendant desires to challenge the validity of additional judgments, the defendant must do so by separate motions. For the purpose of this rule, multiple convictions resulting from a single trial or plea proceeding shall be treated as a single judgment.

(C) Form of Motion. The motion **may not be noticed for hearing, and** must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. **Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 25 pages double spaced, exclusive of attachments and exhibits. An expansion of the pages permitted shall apply also to any answer ordered by the court.** The motion must be substantially in the form approved by the State Court Administrator, and must include:

(1) The name of the defendant;

(2) The name of the court in which the defendant was convicted and the file number of the defendant's case;

(3) The place where the defendant is confined, or, if not confined, the defendant's current address;

(4) The offenses for which the defendant was convicted and sentenced;

(5) The date on which the defendant was sentenced;
(6) Whether the defendant was convicted by a jury, by a judge without jury, or on a plea of guilty, guilty but mentally ill, or nolo contendere;
(7) The sentence imposed (probation, fine, and/or imprisonment), the length of the sentence imposed, and whether the defendant is now serving that sentence;
(8) The name of the judge who presided at trial and imposed sentence;
(9) The court, title, and file number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;
(10) The name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;
(11) The relief requested;
(12) The grounds for the relief requested;
(13) The facts supporting each ground, stated in summary form;
(14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised;
(15) Whether the defendant requests the appointment of counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointment of counsel at public expense.

Upon request, the clerk of each court with trial level jurisdiction over felony cases shall make available blank motion forms without charge to any person desiring to file such a motion.

(D) Return of Insufficient Motion. If a motion does not substantially comply with the requirements of these rules, the court may direct that it be returned to the defendant with a statement of the reasons for its return. The clerk of the court shall retain a copy of the motion.

(E) Attachments to Motion. The defendant may attach to the motion any affidavit, document, **or** evidence, ~~or memorandum of law~~ to support the relief requested.

(F) Amendment and Supplementation of Motion. The court may permit the defendant to amend or supplement the motion at any time.

~~(G) Successive Motions.~~

~~(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for~~

~~relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.~~

~~(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.~~

Committee Comment

Paragraph (C). Though under the current rule the court determines whether there will be a hearing on the motion, language is added to section (C) to further make clear that the motion may not be noticed for hearing. The trial judge must first make a decision on summary dismissal, and, if the motion is not summarily dismissed, must order and receive a response from the prosecutor before deciding whether to hold a hearing. Currently, counsel frequently notice the motion for hearing, and thus language is added her in an attempt to end this practice.

Paragraph (C) and (E). The amendment to section (C) providing that "Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 25 pages double spaced, exclusive of attachments and exhibits" was drawn from a request by the Michigan Judges Association; the amendment to section (E) is in conjunction with the amendment to section (C), and was proposed in the same letter. The language is taken from MCR 2.119 regarding motions and briefs in support of motions. Symmetry appears appropriate here, and so in 6.506 the same limitation is placed on the prosecutor's response, where one is ordered. Circuit judges in Michigan have heavy trial dockets and little assistance, unlike in the federal system or the appellate courts, and lengthy motions are unduly burdensome. The proposed revision, also in the interest of symmetry, also provides that if the trial judge expands the page limits for the motion then the page limits for the answer are automatically expanded to the same extent.

Paragraph (G). Section (G), prohibiting successive motions with certain exceptions, is eliminated because of changes made to 6.508 with regard to the grounds for relief.

RULE 6.503 FILING AND SERVICE OF MOTION

(A) Filing; Copies.

(1) A defendant seeking relief under this subchapter must file a motion **and a copy of the motion**~~, together with two copies,~~ with the clerk of the court in which the defendant was convicted and sentenced.

(2) Upon receipt of a motion, the clerk shall file it under the same number as the original conviction.

(B) Service. The ~~clerk~~ **defendant** shall serve a copy of the motion and notice of its filing on the prosecuting attorney. Unless so ordered by the court as provided in this subchapter, the filing and service of the motion does not require a response by the prosecutor.

Committee Comment

Paragraph (A). Because of the change in paragraph (B) placing the duty of service of the motion on the defendant rather than the clerk of the court, the defendant need file only one copy of the motion with the clerk of the court.

Paragraph (B). The current rule places the duty of serving the motion on the prosecutor on the clerk, rather than on the movant. Experience has taught that this does not work well; frequently, the motion is not served on the prosecutor by the clerk's office even when a request for a response is made, and service is quite often not made when the trial court does not order a response. The proposed change simply requires the movant to serve the opposing party.

RULE 6.504 ASSIGNMENT; PRELIMINARY CONSIDERATION BY JUDGE; SUMMARY DENIAL

(A) Assignment to Judge. The motion shall be presented to the judge to whom the case was assigned at the time of the defendant's conviction. If the appropriate judge is not available, the motion must be assigned to another judge in accordance with the court's procedure for the re-assignment of cases. **The chief judge may reassign cases in order to correct docket control problems arising from the requirements of this rule.**

(B) Initial Consideration by Court.

(1) The court shall promptly examine the motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack. The court may request that the prosecutor provide copies of transcripts, briefs, or other records.

(2) If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial. The clerk shall serve a copy of the order on the defendant and the prosecutor. The court may dismiss some requests for relief or grounds for relief ~~and direct further proceedings as to~~

~~others.~~ **while directing a response or further proceedings to specified grounds**.

(3) If the motion is summarily dismissed under subrule (B)(2), the defendant may move for reconsideration of the dismissal within 21 days after the clerk serves the order. The motion must concisely state why the court's decision was based on a clear error and that a different decision must result from correction of the error. A motion which merely presents the same matters that were considered by the court will not be granted.

(4) If the entire motion is not dismissed under subrule (B)(2), the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505- 6.508.

Committee Comment

Paragraph (A). Given the focus in proposed 6.508 on errors or evidence affecting the outcome of the proceedings, the committee thought it best to maintain the current rule that the motion should be heard by the judge who heard the trial, if that judge is available. This rule holds true even if that judge is no longer assigned to a division other than the criminal division of the circuit court, in courts that have divisions. But for cases where no advantage is gained by having the judge who heard the case initially also hear the motion for relief from judgment, and docket concerns arise, such as when the judge is no longer in the criminal division when the motion is filed, language has been drawn from the Chief Judge rule, MCR 8.110(C), on assignment of cases, to provide flexibility.

Paragraph (B)(2). Despite the language of the rule, it seems that some judges are not aware that they may order a response only to specified issues while dismissing the motion on others. The altered language attempts to highlight this point.

RULE 6.505 RIGHT TO LEGAL ASSISTANCE

(A) Appointment of Counsel. If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter. Counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held.

(B) Opportunity to Supplement the Motion. If the court appoints counsel to represent the defendant, it shall afford counsel 56 days to amend or supplement the motion. The court may extend the time on a showing that a necessary transcript or record is not available to counsel.

Committee Comment

No change is proposed to the current rule.

RULE 6.506 RESPONSE BY PROSECUTOR

(A) Contents of Response. On direction of the court pursuant to MCR 6.504(B)(4), the prosecutor shall respond in writing to the allegations in the motion. **The trial court shall allow the prosecutor a minimum of 56 days to respond.** If the response refers to transcripts or briefs that are not in the court's file, the prosecutor shall submit copies of those items with the response. **Except as otherwise ordered by the court, the response shall not exceed 25 pages double spaced, exclusive of attachments and exhibits**.

(B) Filing and Service. The prosecutor shall file the response and one copy with the clerk of the court and serve one copy on the defendant.

Committee Comment

Paragraph (A). The proposed amendment to section (A) requires that the trial judge give the prosecutor at least 56 days to respond to the motion. When counsel is appointed to supplement a petition filed by a *pro se* defendant, 56 days–the same time given to file an appellant's brief in the Court of Appeals–is provided. The amendment gives the prosecutor at least the same amount of time as given the newly appointed counsel. Responding to appeals of right must take precedence to responding to collateral attacks; in the federal system, the time provided to respond to habeas corpus petitions, including extensions of time, is generous.

Consistent with the page limitations established for the motion for relief itself, requested by the Judges Association, the proposal provides the same page limitations for the prosecutor's response, where one is ordered.

RULE 6.507 EXPANSION OF RECORD

(A) Order to Expand Record. If the court does not deny the motion pursuant to MCR 6.504(B)(2), it may direct the parties to expand the record by including any additional materials it deems relevant to the decision on the merits of the motion. The expanded record may include letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court.

(B) Submission to Opposing Party. Whenever a party submits items to expand the record, the party shall serve copies of the items to the opposing party. The court shall afford the opposing party an opportunity to admit or deny the correctness of the items.

(C) Authentication. The court may require the authentication of any item submitted under this rule.

Committee Comment

No change to the current rule.

RULE 6.508 PROCEDURE; EVIDENTIARY HEARING; DETERMINATION

(A) Procedure Generally. If the rules in this subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner. The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate.

(B) Decision Without Evidentiary Hearing. After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.

(C) Evidentiary Hearing. If the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply. The court shall assure that a verbatim record is made of the hearing.

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant **unless** ~~if~~ the **defendant establishes**

(1) with regard to a conviction following a trial, the probability of a different result on retrial because of

(a) a fully retroactive change in the law; or

(b) an irregularity so offensive as to seriously affect the fundamental fairness, integrity, or public reputation of judicial proceedings; or

(2) in any case,

(a) that by clear and convincing evidence not presented at any previous proceeding, taken together with all the evidence, the defendant is actually innocent; or

(b) that the sentence imposed on the defendant exceeded that authorized by law.

~~seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;~~

~~(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;~~

~~(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates~~

~~(a) good cause for failure to raise such grounds on appeal or in the prior motion, and~~

~~(b) actual prejudice from the alleged irregularities that support the claim for relief.~~

~~As used in this subrule, "actual prejudice" means that,~~

~~(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;~~

~~(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;~~

~~(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;~~

~~(iv) in the case of a challenge to the sentence, the sentence is invalid.;~~

~~The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.~~

(E) Time Limitation.

(1) If brought under subsection (D)(1), the motion must be filed within 1 year

(a) after the fully retroactive change in the law is established when relief is sought under subsection (a);

(b) after the judgment of conviction is final when relief is sought under subsection (b), unless the facts on which the claim is predicated were unknown to the defendant and could not have been discovered earlier with due diligence, in which case the claim must be brought within 1 year of the discovery of these facts.

(2) If brought under subsection (D)(2), the motion must be filed within 1 year

(a) of the discovery of the new evidence, or the discovery of the significance of existing evidence, when relief is sought under subsection (a);

(b) after the judgment of conviction is final when relief is sought under subsection (b).

(F) Restoration of Appeal by Right. If the motion seeks a renewed opportunity for an appeal of right from a judgment of conviction and sentence that the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either

(1) disregarded the defendant's instruction to perfect a timely appeal of right; or

(2) otherwise failed to provide effective assistance and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right,

the trial court shall issue an order restarting the time in which to file an appeal of right.

~~(E)~~ **(G)**Ruling. The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion.

Committee Comment

Paragraph (D) overview. The motion for relief from judgment was originally designed both to bring order and system to the then chaotic practice of postappeal review, and to provide a vehicle

for the correction of egregious error; the subchapter was not designed as a "second appeal." Heightened standards of prejudice were promulgated, as well as the requirement that "cause" be shown for failure to raise the grounds originally in the appeal of right. Instead, motions for relief from judgment are filed routinely that barely attempt to show cause, and where prejudice as defined cannot be demonstrated. The motion for relief from judgment is employed as a second appeal, raising what might be called "garden variety" or routine appellate issues, rather than egregious errors, and much time by busy trial judges is spent going through these issues only to reach the conclusion that they cannot justify relief on a motion for relief from judgment. And in 1995 the Michigan Supreme Court amended the rules to allow only one motion for relief from judgment per judgment, with exceptions for newly discovered evidence and retroactive changes in the law. Still, there is no time limit on filing, and motions are routinely filed in cases dating back decades.

The committee determined that motions for relief from judgment should be limited to outcome-affecting errors, with a particular focus on actual innocence. Particularly with advances in technology, the committee believed it wise and just to provide for relief on a showing of actual innocence, even where the ordinary strictures of diligence required historically for newly discovered evidence claims cannot be met. The trade-off here is the elimination of the traditional "newly discovered evidence claim"–still available during the initial appeal period–in favor of an actual innocence rule, with a heightened standard for relief, but no requirement of diligence in discovery of the evidence. Time limitations on the filing of the motion are also proposed, geared to the nature of the motion. So limiting the grounds for relief from judgment obviates the need for successive motion limitations, and for an examination into "cause" for the failure to raise the issue presented in the motion in the appeal of right, in the view of the committee.

The proposal does not include language precluding the filing of a motion raising grounds already litigated in the appeal of right. This seems superfluous–a lower court cannot overrule a higher court–and so goes without saying; further, the limitation on grounds for relief further obviates the need for stating the obvious. It is certainly not the intention of the committee that trial courts have authority to reconsider issues litigated in the appeal of right.

Paragraph ((D)(1)(a). This provision allows a mechanism for relief for changes in the law that are fully retroactive; that is, retroactive on collateral attack. Retroactivity generally falls into one of four categories. 1)Not retroactive, otherwise known as purely prospective, where the decision is not even applicable to the parties in the case. See e.g. *People v Stevenson*, 416 Mich 383 (1982) (year-and-a-day rule for causation for homicide abrogated, for held purely prospective). 2)Partially retroactive, in the sense of applying only to the parties in the case, and to trials after that date. See e.g. *People v Aaron*, 409 Mich 672 (1980) (common-law felony-murder rule abrogated, and held applicable to the parties in the case, and future trials); 3)Partially retroactive, in the sense of applying to the parties in the case and all cases pending on appeal with the issue properly preserved. See e.g. *People v Milbourn*, 435 Mich 630 (1990). 4)Fully retroactive, applying to all cases, including those where the direct appeal has been concluded before the new decision. See e.g. *Kitchens v Smith*, 401 US 847, 91 S Ct 1089, 28 L Ed 2d 519 (1971) (holding *Gideon* decision fully retroactive).

Paragraph (D)(1)(b). This provision is to provide a mechanism for relief for egregious errors that can be said to have affected the reliability of the outcome.

The standard for review on collateral attack must, in a rational system, be more onerous than that on direct appeal, where the standard for unpreserved error is the "plain error" standard, which applies equally to constitutional and nonconstitutional error. *People v Carines*, 460 Mich 750 (1999). That standard requires a demonstration of error, that is plain or obvious, that affects substantial rights, and to a degree that it resulted in the a miscarriage of justice, *or* the error seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. This miscarriage of justice standard has been explained to mean that the error is one that undermines confidence in the reliability of the outcome. See e.g. *United States v Santisevan*, 39 F3d 250 (1994). The standard on collateral attack is intended to be more difficult than the plain error standard: "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *United States v. Saro,* 24 F.3d 283, 287 (D.C.Cir.1994).

Because of the committee's determination that collateral attack should focus on outcome-affecting error, the standard chosen is akin to the plain-error standard, but in the conjunctive, rather than the disjunctive; that is, while plain error allows error correction in rare circumstances where outcome is not affected by the error, on collateral attack the error must be of this sort of magnitude, but also affect outcome.

Paragraph (D)(2)(a). Though traditional newly discovered evidence claims may be made during the time for direct appeal, as time advances the ability of the State to achieve an accurate result through retrial is affected, and traditional newly discovered evidence standards do not equate to an "actual innocence" claim. The committee decided on a trade-off. A newly discovered evidence claim, allowing relief on a showing of the probability of a different result on retrial, but also requiring that the evidence not have been discoverable with reasonable diligence, is unavailable on a motion for relief from judgment, but in its place an "actual innocence" ground for relief is established, with a heightened burden on the defendant to gain relief, but, if that burden can be met, without restriction on diligence in discovering the evidence.

This provision does not apply to traditional claims challenging the weight or sufficiency of the evidence, or the fairness of the process that led to the conviction, but is reserved the for unusual case where a defendant can demonstrate that he or she was convicted of a crime that he or she in fact did not commit. To prevail, the defendant must show by clear and convincing evidence, taken together with all the evidence, that he or she is actually innocent of the crime. The language "taken together with all the evidence" allows a prosecutor to introduce evidence inadmissible at the trial but relevant on the issue of guilt or innocence, such as evidence suppressed on Fourth Amendment grounds, for the issue here is *actual* innocence. This is a substantial burden meant to set a high standard for relief so that trial courts may quickly dispose of most motions filed under this subsection, while still preserving the opportunity for the court to grant relief to correct a true miscarriage of justice.

It is important to bear in mind that the new evidence in these circumstances need not be the physical item involved itself, such as the stained clothing. That evidence may have been known at the time of trial, and/or since that time, but new testing of the item, such as DNA testing, may lead to *scientific results,* which are themselves "new evidence." And the language of the rule does not limit it to "new" evidence, though it is expected that ordinarily the evidence *will* be new in this sense. Rather, the rule deliberately refers to evidence not previously presented at any proceeding so as to include that rare circumstance where the parties may have overlooked evidence, particularly in the case of a guilty plea, which decisively shows innocence.

Paragraph (D)(2)(b). It also seems reasonable and just that a sentence that is simply outside the authority of the court to impose but that was somehow not challenged on direct appeal should be open to correction. This provision does *not* include guidelines-scoring claims, or guidelines departures, but sentences that exceed the statutory limitation (including the "2/3" rule for the minimum sentence). Substituting these grounds for relief, accompanied by time limitations in paragraph (E), for the current provisions in MCR 6.508 obviates, in the view of the committee, the "successive motion" provision of the current rule, and all inquiry into "cause" as currently required.

Paragraph (E). Federally, both as to collateral attacks of state and federal convictions, the attack must be brought within one year after the conviction is final. A conviction is final when the direct appeal is concluded; most circuits include in the time calculation the time for filing a petition for certiorari (90 days), even when no petition is filed. If a petition *is* filed, then the conviction is final after the Supreme Court rules on it.[55] The United States Supreme Court has just granted certiorari on this question. Because, then, "finality" is a term of legal art, the committee did not propose to define it, but intends that the term be defined consistently with its use in the federal system, as ultimately determined by the United States Supreme Court. To create a longer time period for filing a motion for relief from judgment than exists in the federal system to file a habeas corpus petition from a "final" state conviction might lead prisoners to forfeit their habeas claims unwittingly, while a motion for relief from judgment filed within the federal period of limitations for habeas petitions will toll the running of the federal time limit.

Reworking of the grounds for relief as proposed above limits the need for a "statute of limitations" relating to the time of the finality of the conviction to (D)(1)(b) and (D)(2)(b). Where the claim is that an egregious error occurred that fits the description in (D)(1)(b), or that the sentence is one not permitted by law, but the claim was not raised on direct appeal, some time limit should be placed in relation to the judgment becoming final as defined above. "Cause and prejudice" requirements as defined in the current rule are unnecessary, however, for if the standard for relief is met, then these conditions have, by definition, been shown. Using a one-year limitation period makes sense because it is sufficiently generous, and failure to raise the claim within one year of the judgment becoming

[55] Of course, if the petition is *granted*, the conviction is not final until the opinion of the Court is issued, if that opinion does not grant relief to the defendant.

final forfeits the claim for federal habeas corpus review. As indicated, a rule that encourages a filing that would preserve the claim from federal habeas corpus review seems advisable.

With regard to actual innocence claims and retroactive changes in the law, a limitation period relating to the finality of the judgment is inappropriate (though some states impose such a rule). On the other hand, an unlimited time to file once the grounds for relief are discovered is also inappropriate. Again, one year seems generous, the time running from the discovery of the facts supporting the actual innocence claim, or the significance of those facts, in those rare cases where the evidence is not "new" evidence, and from the retroactive change in the law, respectively.

There remains the danger that (D)(1)(b) will be abused; that is, that "garden-variety" issues will be raised, coupled with general language in the motion that the error is a violation of "due process," and a blanket assertion that without the error meets the described standard, so that motions will be filed looking very much like those currently filed that mimic a direct appeal. But at the least, the committee believes, *judges* will be able to more efficiently identify those claims that do not meet the standards of the rule than presently, saving them much time.

Paragraph (F). Another ground for relief of a different sort should be added. The Michigan Supreme Court has published for comment the following, explaining why the amendment is proposed. The trial court may not grant relief if the motion:

> (4) seeks a renewed opportunity for an appeal of right from a judgment of conviction and sentence that the defendant did not appeal within the time allowed by MCR 7.204(A)(2), unless the defendant demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either
>
> > (a) disregarded the defendant's instruction to perfect a timely appeal of right; or
> > (b) otherwise failed to provide effective assistance and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right.
> >
> > Staff Comment: Proposed new subrule (D)(4) would codify Roe v Flores-Ortega, 528 US 470; 120 S Ct 1029; 145 L Ed 2d 985 (2000).[56]

This proposed amendment allows the trial court to "grant relief" in this situation. If the defendant demonstrates the predicate of the rule–that through no fault of his or her own the defendant has been denied the appeal of right–the relief required under *Roe v Flores-Ortega* is the provision of an appeal by right, and thus the amendment suggested here alters that of the Supreme Court slightly to provide

[56] Michigan Supreme Court Administrative File 01-27, published for comment January 16, 2002.

that upon a demonstration of the factual predicate the trial court must issue an order that restarts the time in which to file an appeal of right.

Because this paragraph does not actually provide relief from the judgment, but rather its reissuance, the committee suggests that it might be advisable to relocate this new provision as a new MCR 6.428, following the rule regarding the judgment order. An alternative proposal is included by the committee at that point.

RULE 6.509 APPEAL

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205. The 12-month time limit provided by MCR 7.205(F)(3), runs from the decision under this subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

(B) Responsibility of Appointed Counsel. If the trial court has appointed counsel for the defendant during the proceeding, that appointment authorizes the attorney to represent the defendant in connection with an application for leave to appeal to the Court of Appeals.

(C) Responsibility of the Prosecuting Attorney. If the motion for relief from judgment was summarily dismissed without order for response from the prosecutor, relief may not be granted by an appellate court unless it first directs a response to the application be filed by the prosecuting attorney.

Committee Comment

Paragraph (C). The proposed new section (C) is intended to eliminate an anomaly in the current rules. The motion may be summarily dismissed by the trial court without calling for a response from the prosecutor, but relief may not be granted without ordering that response. But if an application for leave to appeal is filed in the Court of Appeals from a motion that was summarily dismissed, nothing prevents the Court of Appeals (or Supreme Court, if an application for leave is taken from the Court of Appeals to that court) from granting relief without ordering a response. This leaves prosecutors in the position of having to file answers in the appellate courts when none were required in the trial court as a matter of self-defense, and defeats the purpose behind the summary dismissal provision. The proposal simply "extends" the summary dismissal to the appellate courts, providing that no relief can be granted unless the appellate court first directs a response from the prosecutor.